

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: February 1, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re GMC Machine Tools Corp.

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Serial No. 88773861

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Erin C. Bray and JungJin Lee of Trademark Lawyer Law Firm, PLLC,
for GMC Machine Tools Corp.

Alison Keeley, Trademark Examining Attorney, Law Office 113,
Myriah Habeeb, Managing Attorney.

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Before Shaw, Greenbaum, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

GMC Machine Tools Corp. (“Applicant”) seeks registration on the Principal Register of the mark GMC (in standard characters) for “metalworking machines, milling machines, lathes, fabrication shearing machines, and replacement parts for all of the aforementioned goods,” in International Class 7.¹

¹ Application Serial No. 88773861 was filed on January 27, 2020, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as December 1, 2004.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods identified in the application, so resembles the marks in the following two registrations owned by the same registrant:

- Registration No. 2751651 for the mark  (with a disclaimer of GLOBAL MACHINERY COMPANY) for

machines and power tools, namely, AC power operated drills, battery operated drills, drill bits, AC power operated circular saws, AC power operated jigsaws, battery operated jigsaws, AC power operated miter saws, AC power operated bench saws, AC power operated sanders, AC power operated polishers, AC power operated planers, AC power operated chainsaws, AC power operated grinders, battery operated screwdrivers, AC power operated brush cutters, gasoline operated brush cutters, AC power operated hedge trimmers, battery operated hedge trimmers, AC power operated line trimmers, AC power operated vacuums and blowers, battery operated hand vacuums, and replacement parts therefor, in International Class 7;²

and

- Registration No. 5588697 for the mark GMC CORE (in standard characters) for

machines tools and power tools, namely, electric screwdrivers, electric drill drivers, electric drills, hammer drills, saws, electrically operated hand saws, circular saws, chain saws, electric lawn trimmers, hedge trimmers, routers, electric sanders, electric planers, all capable of

² Registration No. 2751651, issued August 19, 2003. Renewed; Section 15 declaration acknowledged.

being powered by battery connection, parts for the
aforementioned goods, in International Class 7;³

on the Principal Register as to be likely to cause confusion, to cause mistake, or to
deceive.

When the refusal was made final, Applicant appealed and requested
reconsideration. After the Examining Attorney denied the request for
reconsideration, the appeal was resumed and briefed. We affirm the refusal to
register.

I. Preliminary Issues

Applicant attached as unnumbered exhibits to its brief more than a hundred pages
of previously-filed evidence, and cited to the unnumbered exhibits instead of to the
application record.⁴ This was unnecessary, unhelpful, and a waste of resources. *In re*
Michalko, 110 USPQ2d 1949, 1950 (TTAB 2014) (“Parties . . . occasionally seem to be
under the impression that attaching previously-filed evidence to a brief and citing to
the attachments, rather than to the original submission is a courtesy or a convenience
to the Board. It is neither.”) The correct practice is citation to the record. *See id.* at
1950-51; *See also* TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE
(TBMP) § 1203.01 (2021) (“When referring to the record, the applicant and examining

³ Registration No. 5588697, issued October 23, 2018. The registration also lists goods in Class
9 which are not at issue in this appeal.

⁴ Although the body of the brief refers to various exhibit numbers, the material attached to
the brief is not marked or otherwise delineated by exhibit number; it is altogether unhelpful.

attorney should cite to the prosecution history for the application, currently the TSDR database.”).

In addition, Applicant’s brief does not comply with Trademark Rule 2.126(a)(1), 37 C.F.R. § 2.126(a)(1), which requires that all submissions to the Board be double spaced. *See* Trademark Rule 2.124(b)(2), 37 C.F.R. § 2.124(b)(2) (requiring ex parte appeal briefs to comply with Rule 2.126). *See also* TBMP § 1203.01. However, because the nine pages of single-spaced text, if it had been double-spaced, when combined with the additional four pages of text copied into the brief from TESS, would fall within the applicable page limits had the brief been properly formatted, we exercise our discretion to accept it. *See In re Univ. of Miami*, 123 USPQ2d 1075, 1077 n.2 (TTAB 2017). Moreover, it would serve little purpose to strike the brief since it is all but reproduced verbatim from the May 17, 2021 Request for Reconsideration, which itself is almost completely reproduced from the October 22, 2020 Response to Office Action. Nonetheless, counsel for Applicant is advised that it must in the future comply with all rules and procedures governing briefing of ex parte appeals.

II. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a proposed mark, for which application has been made, may be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods [or services]

of the applicant, to cause confusion, or to cause mistake, or to deceive” 15 U.S.C. § 1052(d).

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

Varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Two key considerations are the similarities between the marks (the first *DuPont* factor) and the relatedness

of the goods (the second *DuPont* factor). See *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004). Applicant argues these first two *DuPont* factors as well as the third, fourth, seventh, and eighth factors. We address each factor below.

A. Similarity or Dissimilarity of the Marks

We begin with the first *DuPont* factor which considers the “similarities or dissimilarities of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard*, 6 USPQ2d 1467, 1468 (TTAB 1988).

The proper test regarding similarity “is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (internal quotation marks and citation omitted)). We keep in mind that “[s]imilarity is not a

binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

The emphasis of our analysis must be on the recollection of the average purchaser, who normally retains a general, rather than specific, impression of trademarks. *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014). Since the relevant goods include power tools, metalworking machines, milling machines, lathes, and fabrication shearing machines without any restrictions or limitations, the average purchaser is an ordinary consumer of such tools and machines.

Applicant’s mark is GMC in standard characters. The mark in cited Registration

No. 2751651 is  with a disclaimer of GLOBAL MACHINERY COMPANY, and the mark in cited Registration No. 5588697 is GMC CORE in standard characters.

Since both of the cited marks cover machine and power tools in Class 7, we focus our analysis on Registration No. 2751651 for the mark . If confusion is likely between Applicant’s mark and the mark in this registration, there is no need for us to consider the likelihood of confusion with the other cited mark. *See, e.g., In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

It is evident from viewing this cited mark that the initials GMC are large and dominate the mark. The GMC element is the largest portion of the mark, is visually prominent because it is central and boldly outlined, sits atop the much smaller and

descriptive GLOBAL MACHINERY COMPANY element, and comes first when the mark is read either right-to-left or top-to-bottom. Being the largest, leading, and dominant element of the mark, GMC is most likely to be remembered by consumers. *See, e.g., Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.”). *See also Detroit Athletic Co.*, 128 USPQ2d at 1049.

Applicant argues that “the unique design” in Registrant’s mark distinguishes it from Applicant’s mark. 6 TTABVUE 14.⁵ However, the slight stylization of the letters in Registrant’s mark is not so distinctive, in and of itself, as to distinguish the marks, especially because Applicant seeks to register its mark in standard characters. The rights associated with a mark in standard characters reside in the wording, not in any particular display. Thus, Applicant seeks registration of a mark that it might depict in any manner, regardless of the font style, size, or color, and we must consider that Applicant may display its mark so that GMC is in the exact lettering style used by Registrant. *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-10 (Fed. Cir. 2012); *Citigroup Inc.*, 98 USPQ2d at 1259; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018). *See also Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) (rejecting argument that for purposes of determining whether two marks are similar, a mark in a typed or standard character

⁵ Citations to the briefs in the appeal record refer to the TTABVUE docket system. Citations to the prosecution file refer to the .pdf version of the TSDR system record. *In re Consumer Protection Firm PLLC*, 2021 USPQ2d 238, *3 n.3 (TTAB 2021).

format is distinct from such mark in a logo format; “[b]y presenting its mark in a typed drawing, a *difference* cannot legally be asserted by that party”). Additionally, purchasers are more likely to remember the identical letters, GMC, appearing in both marks rather than the particular manner of display, because it is the wording in the marks that purchasers will rely on in calling for or referring to the goods. *See In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (the word portion of a composite word and design mark is generally accorded greater weight because it would be used to request the goods or services).

Applicant’s standard character GMC mark is identical to the literal GMC element of Registrant’s mark. While there is no explicit rule that likelihood of confusion automatically applies where an applicant’s mark is comprised in its entirety of a portion of a registrant’s mark, the fact that Applicant’s mark subsumes the dominant portion of Registrant’s mark increases the similarity between the two. *See, e.g., Hunter Indus., Inc. v. Toro Co.*, 110 USPQ2d 1651, 1660 (TTAB 2014) (“Likelihood of confusion often has been found where the entirety of one mark is incorporated within another.”). These GMC elements are not only similar and potentially identical in appearance, they are also identical in sound. As Applicant acknowledges, “[p]honetically, the marks are . . . similar in their use of the word [sic] ‘GMC.’” 6 TTABVUE 14. We agree.

Applicant argues that the “presence of the additional words” GLOBAL MACHINERY COMPANY in Registrant’s mark also distinguishes it from Applicant’s mark. 6 TTABVUE 14. We acknowledge that the dominant GMC element of

Registrant's mark is followed by the descriptive and disclaimed term GLOBAL MACHINERY COMPANY, but the wording is subordinate in size and position and because it is descriptive and has been disclaimed. Although we consider the marks in their entireties, the presence of the subordinate wording GLOBAL MACHINERY COMPANY in Registrant's mark is of much less consequence than the large, dominant GMC element. *See, e.g., In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985) (“[A] descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion”); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark's commercial impression”). *See also In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (“ML is likely to be perceived as a shortened version of ML MARK LEES when used on the same or closely related skin care products.”).

Applicant argues that its “mark is the phrase [sic] ‘GMC.’ The combination this unitive phrase creates a distinct meaning.” [Sic.] 6 TTABVUE 15. As best we can understand, by this argument Applicant appears to posit that its mark GMC conveys a specific meaning. However, Applicant never states what that “distinct meaning” is. At the same time, Applicant argues that GMC “is an abbreviation with many possible meanings including General Motors Corporation, General Military Course, General Medical Council, Green Mountain Club, Get More Chicks, Chief Gunners Mate, Georgia Military College, and Gospel Music Channel, and many more.” *Id.* There is no evidence that GMC has any meaning within the machine and power tool

industries, and we see no reason why GMC could not have the same connotation in each mark. More specifically, while the cited mark contains the descriptive wording GLOBAL MACHINERY COMPANY which gives the GMC portion of that mark a connotation of a specific initialism, it is equally possibly that Applicant's GMC mark could carry the same or similar meaning, especially given the descriptive nature of the wording which, as the Examining Attorney points out, "merely conveys that the [mark owner] is a business enterprise that offers machines worldwide." 8 TTABVUE 7.

We find the marks to be quite similar in appearance, sound, and connotation. The first *DuPont* factor thus supports a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

The second *DuPont* factor "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,'" while the third *DuPont* factor considers "the similarity or dissimilarity of established, likely-to continue trade channels." *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). We must make our determinations under these factors based on the goods as they are identified in the application and cited registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may

reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.")); *see also In re Info. Builders Inc.*, 2020 USPQ2d 10444, *2 (TTAB 2020).

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1722; *Hilson Research, Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue is not whether consumers would confuse Applicant's goods with Registrant's goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Moreover, registration must be refused if Applicant's mark for any of its identified goods is likely to cause confusion with Registrant's mark for any of its identified goods. *Info. Builders*, 2020 USPQ2d 10444, *2 (citing *SquirtCo v. Tomy Corp.*, 216 USPQ at 938-39 (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application)).

As indicated above, Applicant's goods are identified as "metalworking machines, milling machines, lathes, fabrication shearing machines, and replacement parts for all of the aforementioned goods." The goods in Registration No. 2751651 include machines and power tools such as AC power-operated drills, circular saws, jigsaws, miter saws, bench saws, sanders, polishers, planers, chainsaws, grinders, brush cutters, hedge trimmers, line trimmers, vacuums, and blowers; battery operated drills, jigsaws, screwdrivers, hedge trimmers, and hand vacuums; gasoline operated brush cutters; replacement parts therefor; and drill bits.

Applicant argues that Registrant's "tools are designed for handheld use and are all made specifically for woodworking and wood construction," 6 TTABVUE 12, while its own goods "are specifically designed for metal working and fabrication," "are large and cumbersome and designed for use in factories and metalworking machine shops," and are not "designed for handheld use or for use in woodworking or wood construction." 6 TTABVUE 13.

Although Applicant attempts to limit the size, use, and purpose of Registrant's goods, there are no "handheld" nor "woodworking or wood construction" limitations in Registrant's identification, and we give that identification its full sweep. *See, e.g., Stone Lion*, 110 USPQ2d at 1162 (Board must "give full sweep" to an identification of goods regardless of registrant's actual business). There is nothing to limit the use and purpose of Registrant's goods solely to woodworking; they may also be used to drill, cut, polish, or grind metal – or any other material.⁶ Similarly, there is no limitation

⁶ Even if Registrant's goods were limited to woodworking, we note that there is no limitation to Applicant's "lathes" which may be used in woodworking. As defined by THE AMERICAN

on the size of Registrant's goods, which may encompass, for example, large "machine" drills and saws for use in factories. *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods."). Indeed, the Examining Attorney introduced internet webpage printouts from JET demonstrating that drills, miter saws, and grinders may be large machines used in industrial metalworking. *See, e.g.*, April 22, 2020 Office Action at TSDR 43-45 (jettools.com/us/en/metalworking). Accordingly, giving Registrant's identification of goods its full sweep, we must consider that the goods identified in the registration include smaller, hand-held power tools as well as larger machines, both for working with wood, metal, or any other material.

In support of the refusal the Examining Attorney also introduced internet webpage printouts demonstrating that several "companies that offer electric power tools like the drills, saws, and grinders in the registrations commonly also offer metalworking machines, milling goods, lathes, and shearing goods" under the same mark. 8 TTABVUE 11. For example:⁷

- Baileigh Industrial offers drills, planers, saws, lathes, mills, shears, and various metalworking machines;

HERITAGE DICTIONARY, a "lathe" is "[a] machine for shaping a piece of material, such as wood or metal, by rotating it rapidly along its axis while pressing a fixed cutting or abrading tool against it." (ahdictionary.com, accessed January 30, 2022.) The Board may sua sponte take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including definitions in online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). *See also* TBMP § 1208.04.

⁷ April 22, 2020 Office Action at TSDR 48-60 (baileigh.com), and 61-65 (cantekamerica.com); November 16, 2020 Office Action at TSDR 67-74 (jmtusa.com), 75-88 (dewalt.com), 101-06 (knuth-usa.com), and 158-64 (boltontool.com).

- CanTek offers planers, saws, sanders, grinders, milling machines, lathes, and various metalworking machines;
- JMT offers metalworking lathes and machines, saws, and milling machines;
- DeWalt offers metalworking tools, grinders, shears, drills, saws, polishers, and other power tools;
- Knuth offers drills, grinders, saws, lathes; and
- Bolton Tools offers lathes, saws, milling machines.

The Examining Attorney also introduced more than twenty third-party registrations for marks used on various metalworking machines and lathes, and drills, saws and other machines and power tools. *See* April 22, 2020 Office Action at TSDR 14-40; November 16, 2020 Office Action at TSDR 9-60. The following examples from the November 16, 2020 Office Action are representative.

Registration No.	Mark	Relevant Goods
5260533	CIOOT	Drills, grinders, lathes, metalworking machines
5395704	HILEMATO	Drills, lathes, milling machines, grinders
5571952	BOQIU ♦ TOOLS	Drills, metalworking machines, sanders
5801303	metabo HPT	Various drills, grinders, saws, milling machines, planing machines, metalworking machines
5569559	MAOTAILANG	Saws, lathes, metalworking machines
5985068	DURABILITY FIRST	Chain saws, hedge trimmers, drilling machines, grinders, lathes, metalworking machines

We find the internet excerpts are sufficient to establish that Applicant’s metalworking machines and lathes and Registrant’s machines and power tools are

related in that they are of a type that commonly originate from the same source under the same mark, are used by the same consumers, and serve complementary purposes. Similarly, although the third-party registrations are not evidence that the registered marks are in use or that the public is familiar with them, they nonetheless have probative value to the extent they are based on use in commerce and serve to suggest that Applicant's metalworking machines and Registrant's machines and power tools are of a kind which may emanate from a single source under a single mark. *See In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Additionally, because the identification of goods in the application and registration do not include any restrictions or limitations as to trade channels, we presume the respective goods are or would be marketed in all normal trade channels for such goods. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *Thor Tech*, 90 USPQ2d at 1638; *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006). The Examining Attorney's internet evidence summarized above also establishes that metalworking machines and lathes such as those identified in the application, and machines and power tools such as those identified in the registration, are offered through the same channels of trade to the same consumers.

The *DuPont* factors relating to the similarity of the goods and channels of trade favor a finding of likelihood of confusion.

C. Consumer Sophistication

“The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e., “impulse” vs. careful, sophisticated purchasing.” *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567).

Applicant argues that consumers of its goods seek “large metalworking machinery . . . specific to their metalworking needs . . . [and priced] from \$14,000 to \$26,000 with additional options available to consumers in the \$1,000 range.” 6 TTABVUE 12. In support of its argument Applicant submitted “copies of price sheets and product specs,” May 17, 2021 Request for Reconsideration at TSDR 131, showing three of its metalworking machines are priced between \$14,850 and \$28,850, *id.* at 109, while its accessories therefor may be priced from \$375 (for a cone attachment). *Id.* at 112. *See also id.* at 115. The record otherwise supports that metalworking machines are not inexpensive items and may be priced from \$1,388.25 for a metal lathe to \$32,524.86 for a milling machine, *see* November 16, 2020 Office Action at TSDR 164 (boltontool.com). There is no evidence of record to support the price of smaller, hand-held power tools in the United States, such as those which Applicant contends are contemplated by Registrant’s identification of goods, but Applicant argues that “Registrant’s tools range from \$80-\$150 . . . and are much less expensive than Applicant’s goods.” 6 TTABVUE 12.

Contrary to Applicant’s argument that its metalworking machines “can only be purchased at Applicant’s establishment,” 6 TTABVUE 12, as shown by the Examining Attorney’s evidence, customers can purchase the types of goods of

Applicant and Registrant under identical marks from the same source which greatly increases the likelihood of confusion. Thus, customers encountering Applicant's metalworking machines and Registrant's machines and power tools in connection with similar marks are likely to believe the goods emanate from the same source.

The goods at issue as identified in the application and registration could include not just large and expensive metalworking machines (contemplated by both the application and registration), but also smaller, hand-held power tools (contemplated by the registration) offered to all types of consumers, including ordinary consumers exercising an ordinary degree of care. The goods identified in the involved application and cited registration are not restricted by trade channel or price point, and will be available to all interested purchasers. Applicant has not demonstrated how consumers of these goods make decisions to purchase, and we must consider that the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163, cited in *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) *aff'd* 778 F. App'x 962 (Fed. Cir. 2019) ("Board precedent requires our decision to be based on the least sophisticated potential purchasers.").

Were we to accord a high level of sophistication to the purchasers of the goods at issue due to their price alone, even sophisticated purchasers are not immune from source confusion. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers . . . are not infallible.")); *In re Davey Prods.*, 92 USPQ2d at

1204 (TTAB 2009) (“[E]ven if we were to find that the goods are somewhat expensive and that some care would be taken in purchasing the goods, it is well-settled that even careful purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar . . . marks on or in connection with the goods.”); *see also In re Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001) (“[T]he sophistication and care of purchasers under the fourth [*DuPont*] factor is not controlling in this case, and . . . it does not render these purchasers immune to source confusion arising from use of these highly similar marks on these related goods”); *In re Total Quality Grp. Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999) (“[E]ven careful purchasers are not immune from source confusion”); *In re Decombe*, 9 USPQ2d 1812, 1814-15 (TTAB 1988) (being knowledgeable and/or sophisticated in a particular field does not necessarily endow one with knowledge and sophistication in connection with the use of trademarks).

D. Absence of Evidence of Actual Confusion

The seventh *DuPont* factor considers the “nature and extent of any actual confusion,” *DuPont*, 177 USPQ at 567, and the eighth *DuPont* factor considers “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *6 (TTAB 2020) (quoting *DuPont*, 177 USPQ at 567). Generally, the absence of any reported instances of confusion is meaningful only if the applicant provides contextual evidence that allows the Board to meaningfully assess the length of time and degree to which the applicant’s and registrant’s commercial activities would have

provided an opportunity for confusion to have manifested itself if it were likely. *In re Embiid*, 2021 USPQ2d 577, at *39 (TTAB 2021) (citing *Guild Mortg.*, 2020 USPQ2d 10279, at *8); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *9 (TTAB 2019).

Applicant argues that it has used its GMC mark “in commerce since at least 2004,” Registrant “began using its mark . . . in Australia since as early as 2002,” and the respective marks “have been in simultaneous use, for at least 17 years, without any recorded instances of consumer confusion” 6 TTABVUE 11.

The brief cites no evidence to support Applicant’s arguments, and there is no evidence of record as to the length of time and degree to which Applicant’s and Registrant’s commercial activities may have provided an opportunity for confusion to occur. We note that both of the cited registrations were registered under Section 44(e), which does not require use in commerce for registration. *See* 15 U.S.C. § 1126(e); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) §§ 1001 and 1009 (July 2021). While Applicant submitted some Internet excerpts demonstrating that Registrant manufactures power tools, none of the evidence clearly demonstrates use in the United States, but instead shows retail locations in the United Kingdom and/or prices for Registrant’s goods in British Pound Sterling. *See, e.g.*, May 17, 2021 Request for Reconsideration at TSDR 107-08 (toolstream.com), 118-26 (selantsandtoolsdirect.co.uk), 127-30 (sitebox.ltd.uk). *See also Id.* at TSDR 66-80 (gmctools.com/en-GB, containing the national flag of the United Kingdom and based on the URL presumably showing goods available in Great Britain). Similarly, the

evidence does not demonstrate the length of time Registrant has used its marks in commerce.⁸

Applicant's argument that it is not aware of any instances of actual confusion between the marks, 6 TTABVue 11, is entitled to little weight, particularly since any such instances would be outside of the United States. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (“[U]ncorroborated statements of no known instances of actual confusion are of little evidentiary value.” (citing *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion)). As the Board observed in *In re Opus One, Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001), and explained in *Guild Mortg.*, 2020 USPQ2d 10279, at *7-8, in an ex parte context, there is no opportunity to hear from the registrant about whether it is aware of any reported instances of confusion, thus limiting the potential probative value of evidence bearing on the eighth *DuPont* factor, compared with an inter partes proceeding where the registrant has an opportunity to present argument and evidence on the matter. We find the seventh and eighth *DuPont* factors to be neutral.

⁸ Although Registration No. 2751651 has been renewed, neither the allegation of use in commerce nor the specimens submitted with the combined declaration of use and application for renewal are in evidence in this appeal. See Trademark Rule 2.122(b)(2); 37 C.F.R. § 2.122(b)(2). Similarly, Applicant's date of use alleged in its application is not in evidence, *id.*, and “[a]ttorney argument is no substitute for evidence,” *Cai v. Diamond Hong*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

E. Summary and Conclusion

We have found the marks to be similar in appearance, sound, and connotation; and we have found that the goods commonly originate from the same source under the same mark, are used by the same consumers, serve complementary purposes, and are offered in the same channels of trade. There is a lack of meaningful evidence as to actual confusion and concurrent use of the marks.

When we consider all of the arguments and evidence of record, and all relevant *DuPont* factors, we conclude that ordinary consumers of machines and power tools offered under the registered mark  would be likely to believe, upon encountering Applicant's GMC mark, that its various metalworking machines originated with or are associated with or sponsored by the same entity. In the absence of stronger evidence relating to the degree of care ordinary purchasers exercise with regard to the goods at issue, the similarity of the marks, goods, and channels of trade outweigh Applicant's assertion that purchasers are sophisticated or careful in their purchases. *See HRL Assocs., Inc. v. Weiss Assocs., Inc.*, 12 USPQ2d 1819, 1823 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decisions, and expensive goods). "Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of products." *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

III. Decision

The refusal to register Applicant's mark GMC is affirmed based on Registration

No. 2751651 for the mark  .